United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2677

To be argued by
V. THOMAS FRYMAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2677

UNITED STATES OF AMERICA,
Appellee,

—v.—

MARTIN L. ROEMER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

V. THOMAS FRYMAN, JR.,
DAVID A. CUTNER,
LAWRENCE S. FELD,
Assistant United States Attorneys, Of Counsel.

TABLE OF CONTENTS

Table of Authorities

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2677

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN L. ROEMER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Martin L. Roemer appeals from the judgment of conviction entered on December 12, 1974, in the United States District Court for the Southern District of New York following a six-day trial before the Honorable Inzer B. Wyatt, United States District Judge, and a jury.

Indictment 70 Cr. 130, filed on February 25, 1970, (App. 6-10)* charged Roemer and Fritz Claudius Mintz in one count with conspiracy to defraud the United States in violation of Title 18, United States Code, Section 371. Mintz has been a fugitive since the indictment was filed. Roemer's trial began on October 29, 1974, and concluded on November 6, 1974, when the jury returned a verdict of guilty.

* "App." refers to pages of Appellant's Appendix; "Tr." refers to pages of the trial transcript; "GX" refers to Government Exhibits received in evidence.

On December 12, 1974 Judge Wyatt sentenced Roemer to a suspended term of imprisonment of one year, placed him on probation for one day and fined him $5,000 (App. 278-79).

Statement of Facts

A. The Government's Case

The Army and Air Force Exchange Service ("AAFES") during the period of the indictment operated many retail stores, or post exchanges, at military installations throughout the world which sold a wide variety of merchandise to military personnel (Tr. 40-41). Buyers were assigned to the local post exchanges, and during the years 1960 through 1966 for exchanges located in Europe the local buyers were permitted to make direct purchases of overseas or foreign merchandise (Tr. 41-42). All orders for merchandise of United States origin, however, were processed through the AAFES buying offices in New York or San Francisco (Tr. 41-42). For such purchases, the exchange buyers would forward certain purchase forms to the AAFES buying office in New York or San Francisco, and a contracting officer there would do the actual buying (Tr. 43-49). Roemer was a contracting officer in the AAFES New York buying office during 1961 through 1966, and he had principal responsibility for the purchase of electronic equipment (Tr. 43-44, 56).

Defendant Mintz together with Morton Penn owned International Sales Service Establishment ("ISSE"). At the trial, Penn testified for the Government under a grant of immunity. ISSE was a manufacturers' representative for certain manufacturers which sold goods to AAFES. Penn testified that ISSE received as commissions a percentage of the sales to AAFES by companies which it represented and that it passed on a portion of those commissions to AAFES employees, including Roemer.

Penn and Mintz agreed to form ISSE during a series of meetings in Germany where Mintz maintained his home and office. Joe Johns, a buyer in Europe for AAFES and a friend of Mintz, arranged the meetings between Penn and Mintz and participated in some of the discussions. ISSE was to be a manufacturers' representative for various American and foreign companies in negotiating sales to AAFES buyers in Europe. The company also was to be a vehicle for channeling bribes to AAFES buyers equal to two percent of the cost of goods purchased to be paid from commissions it received from the manufacturers. Mintz incorporated ISSE in Lichtenstein, and he and Penn each owned half of the stock. To have cash available in Europe to pay the buyers, and to avoid American taxes, a numbered account was established in Bank Leu in Zurich, Switzerland. (Tr. 115-22, 142, 259-60).

Mintz worked in Germany for ISSE, and Penn in New York. Mintz periodically sent cash to Penn by registered mail in $500 amounts wrapped in carbon paper to cover expenses in New York, including payments to buyers by Penn (Tr. 133). Mintz maintained the books and records for ISSE in Europe (Tr. 134). He calculated the amounts payable to AAFES buyers, and he notified Penn of the amounts due for any payments to be made in New York (Tr. 139). Penn and Mintz corresponded about the affairs for ISSE in Europe (Tr. 134). He calculated the amounts ing the payments he had made from the cash received from Mintz (Tr. 134-36). To hide the identity of the buyers in the event that any of the records were discovered, Penn and Mintz adopted a set of code names (although Penn occasionally failed to use the code names) and used certain code words in the correspondence such as "tickets" for dollars (Tr. 162-63, 182). As a further precaution, Penn did not keep copies of letters or statements he sent to Mintz, and he destroyed papers he received from Mintz by using a paper shredder in his office (Tr. 134, 136). On numerous occasions Penn told Mintz to destroy the documents which recorded the bribes (Tr. 287).

During the initial series of discussions Johns emphasized to Penn and Mintz the importance of Roemer. He told them that Roemer was a direct buyer in many areas, that he had control of certain open orders that passed through and that he was in a position to hurt them tremendously if he wanted to by slowing down orders or by getting replacements for items ordered (Tr. 120). It was decided to pay Roemer specific amounts to be designated by Mintz to assure that he would not create any problems for ISSE; if Roemer was of any assistance in increasing the volume of business he would get two percent of the gross (Tr. 140-41). Mintz thereafter sent Penn instructions to pay specific amounts to Roemer which Penn paid from the cash he received from Mintz (Tr. 142). Penn reported these payments generally using the code name "Romero" in his periodic reports to Mintz (Tr. 163).

Mintz failed to destroy all of the documents representing those payments, and on October 17, 1966, when the German tax authorities executed a search order of his home and office (Tr. 86), several expense reports from Penn showing payments to Roemer were seized. Penn's expense report for July 1963 (GX 6) showed a payment to Roemer of $2,500 (Tr. 93, 169-79). Penn's expense report for September 1963 (GX 7) showed a payment to "Romero", or Roemer, of $2,000 on September 16 (Tr. 192-93). In a letter dated October 4, 1963 (GX 5), which accompanied that report, Penn stated that he had rounded out the figures for "Romero", or Roemer (Tr. 179-84). Penn's expense report for April 1964 (GX 9) showed a payment to "Romero", or Roemer, of $1,730 on April 23 (Tr. 201-04). A letter from Penn to Mintz dated July 22, 1965 (GX 12-13) instructed Mintz to record a $2,500 payment to "Romero", or Roemer (Tr. 205-06). A letter seized by the German tax authorities from Mintz to Penn dated the preceding day, July 21, 1965 (GX 11), complained that "the very high commitments to Cotton, Romera, Boyd, Cockburn, are more than we can

handle at the moment." (Tr. 210-14).* These documents showed total payments to Roemer of $8,730.

Penn also had failed to destroy all of his records. He had accidentally kept copies of the July and September 1963 expense reports which he had mailed to Mintz (GX 18, 20, 20A; Tr. 169-79, 191-97). Penn had made handwritten notes of his payments at the time that he had paid out the money, and he had used such notes to dictate the expense reports to Mintz (Tr. 135-36). A few of these notes were also accidentally retained in a small petty cash box in New York (Tr. 195), and some of them reflected payments to Roemer. One such note (GX 19) was used to prepare the September 1963 expense report for Mintz which was seized by the German tax authorities (GX 7; 191-97). Other payments shown by Penn's notes were not reflected in the records seized in Germany: a payment to Roemer of $2,000 in July 1962 (GX 15; Tr. 145-54); a payment to Roemer of $2,000 in February 1963 (GX 17; Tr. 164-69); and an undated payment to Roemer of $1,800 (GX 21; Tr. 215-20). These records showed payments to Roemer of $5,800 in addition to the $8,730 of payments shown in the records seized in Germany. Combined, these records showed payments to Roemer totalling $14,530.

Two of Penn's former secretaries, Chrystal Vorwitt and Amy Dunn, testified for the Government. Each was familiar with the code names used in the correspondence and statements exchanged between Penn and Mintz, and each recognized "Romero" as the code name for Roemer (Tr. 471, 534, 536). Each had also handled the $500 packages of cash sent by Mintz to Penn wrapped in carbon paper by registered mail (Tr. 470, 539).

Penn testified that he met with Roemer on 15 to 30 occasions during the years 1962 through 1966 (Tr. 136).

---

* GX 3 and 10, also seized by the German authorities, showed expenses incurred by Penn to entertain Roemer (Tr. 143, 206-10).

Several times Roemer came to Penn's office to collect his money (Tr. 221). On one such visit Penn observed that Roemer was nervous, and he asked Penn to close the venetian blinds when he noticed lights burning in an office across the street (Tr. 221). Penn also frequently telephoned Roemer at his AAFES office. In those telephone conversations, Penn used the agreed upon code name of "Mr. Diamond" to keep his identity secret from those who might listen in on the conversation at AAFES (Tr. 137).

Penn's secretaries, Vorwitt and Dunn, also remembered the meetings and telephone calls between Penn and Roemer. Vorwitt recalled seeing Roemer in Penn's office on three or four occasions, and she was able to select Roemer's photograph from a photographic spread displayed to her by an agent of the Federal Bureau of Investigation (GX 28; Tr. 477-78). She also heard Penn place a number of telephone calls and ask for Mr. Roemer; in those conversations Penn identified himself as "Mr. Diamond" (Tr. 472-74). Dunn saw Roemer in Penn's office on one occasion. Penn told her that Roemer was coming to his office and that she should leave when he arrived. When the switchboard operator told Penn that Roemer was in the office, Dunn got up and walked out as Penn brought Roemer back into his office and closed the door (Tr. 568-69). Dunn was also able to select Roemer's photograph from a photographic spread displayed to her by an agent of the Federal Bureau of Investigation (GX 28; Tr. 541-43).

Roemer, in an interview on February 28, 1968, with two agents of the Federal Bureau of Investigation, claimed that he had only met Penn once at a social gathering, that he had had no business dealings with Penn, and that he had never spoken to Penn on the telephone (Tr. 454, 648-49; GX 27).

B. The Defense Case.

Roemer did not testify. He called three witnesses: Robert Andrew Cox, John Gilhooly and William La Marca.

Cox had been Roemer's superior at AAFES. At the time he testified he worked as a consultant for Titan United Corporation, a company of which Roemer was a principal (Tr. 710-11). Cox testified that during the years 1961 through 1966, Roemer had raised questions about four orders with companies which Penn represented (Tr. 689-98, 706-08, 720-21). Gilhooly, who had been Cox's superior at AAFES, testified that Roemer had questioned two of the four orders that Cox had testified about (Tr. 741, 746-54). La Marca had been employed by AAFES while he attended law school, and he had worked with Roemer (Tr. 777-79). He had heard Roemer state in front of Cox and an attorney for AAFES that Penn was dishonest and was working together with Joe Johns, an AAFES buyer in Europe (Tr. 781-82).

ARGUMENT

POINT I

Roemer's Trial Did Not Violate Rule 6 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases.

A. Prior Proceedings.

On June 11, 1973, this Court in *United States* v. *Lasker*, 481 F.2d 229 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974), granted the Government's petition for a writ of mandamus directing the Honorable Morris E. Lasker, United States District Judge, to reinstate Indictment 70 Cr. 130 and six other companion indictments.* Judge Lasker had previously dismissed those indictments on December 5, 1972, under Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. On June 22, 1973, Roemer filed papers in this Court in support of a motion to extend the time to file a petition for rehearing, and on June 29, 1973, an order was filed granting that motion. Roemer's petition with suggestion for rehearing in banc was filed on July 6, 1973, and was denied in an order filed on August 7, 1973. On August 16, 1973, defendants in several of the companion cases filed papers in support of a motion to stay issuance of the mandate, which motion was denied by an order filed on September 5, 1973. The mandate then issued on September 6, 1973.

On September 12, 1973, the original record of proceedings in this Court was certified for transmission to the Supreme Court of the United States. On November 8, 1973, Max Wild and Gregory J. Perrin, who served as counsel for

---

* The six other cases were *United States* v. *Carr*, 70 Cr. 126; *United States* v. *Shea*, 70 Cr. 127; *United States* v. *Munns*, 70 Cr. 128; *United States* v. *Bisgyer*, 70 Cr. 129; *United States* v. *Ferguson*, 70 Cr. 131; and *United States* v. *Carone*, 70 Cr. 132. The defendants in each case were one AAFES buyer and Mintz.

three defendants in the companion cases, filed a petition for certiorari in the Supreme Court on behalf of the petitioner, Honorable Morris E. Lasker. The Appearance Form in the Supreme Court signed by Mr. Wild as counsel for the petitioner, Honorable Morris E. Lasker, specified that he was to be informed of the Supreme Court action by collect telegram, and the Appearance Form in the Supreme Court signed by Mr. Perrin as counsel for the petitioner specified that notice of the Supreme Court action should be sent by collect telegram to Mr. Wild. The Supreme Court denied the petition for certiorari on March 18, 1974, and the Clerk of the Supreme Court on that date sent both a collect telegram and a confirming letter to Mr. Wild informing him of the Supreme Court action.*

Judge Lasker in a telephone conversation with Assistant United States Attorney Frank H. Wohl in the fall of 1973 indicated that he intended to hold in abeyance further proceedings on the seven indictments which he had been directed to reinstate pending action by the Supreme Court on the petition for certiorari. After the Supreme Court denied certiorari on March 18, 1974, Mr. Wild and Mr. Perrin, who had appeared in the Supreme Court as counsel for Judge Lasker, apparently failed to inform him of the Supreme Court action, although they received immediate notification of that action from the Clerk of the Supreme Court. Because of an internal breakdown of communications from the Solicitor General's office, Mr. Wohl did not receive notification of the Supreme Court action. In May or early June 1974, Judge Lasker's secretary telephoned Mr. Wohl and

* The Appearance Forms and correspondence referred to in this paragraph are contained in the Supreme Court file for *Lasker* v. *United States*, Docket No. 73-746, and are attached as exhibits to the affidavit of V. Thomas Fryman, Jr., sworn to on February 25, 1975, and filed in support of the Government's motion for reargument of defendant's motion to dismiss the indictment in *United States* v. *Carone*, 70 Cr. 132 (S.D.N.Y.). The affidavit and exhibits are reprinted in the Addendum, pages 15a-24a, *infra*.

asked about the status of the case. Mr. Wohl then telephoned the Solicitor General's Office, learned for the first time that the petition for certiorari had been denied, and immediately telephoned Judge Lasker's secretary with this information. The secretary then asked Mr. Wohl to write Judge Lasker a letter informing him of the Supreme Court's action. There is no record of Mr. Wohl sending such a letter. On July 24, 1974, Mr. Wohl telephoned Judge Lasker's chambers to find out when the seven cases would be tried, and during that conversation he learned that Judge Lasker had not been aware of the Supreme Court action. In a letter to Judge Lasker the following day, Mr. Wohl recounted the telephone conversation in May or early June 1974 where he informed Judge Lasker's secretary of the Supreme Court action, the request in that conversation for a confirming letter about the Supreme Court action to Judge Lasker, and the apparent absence of any file copy of such a letter in the files of the United States Attorney's Office. On August 1, 1974, at the request of Judge Lasker, six of the seven outstanding indictments, including 70 Cr. 130 naming Roemer, were reassigned to other judges. During the period from September 6, 1973, when the mandate issued from this Court, until August 1, 1974, Roemer gave no notification to the Court or to the United States Attorney's Office that he desired to proceed to trial.*

---

* Statements in this paragraph are based on (a) the letter from Mr. Wohl to Judge Lasker dated July 25, 1974 (App. 32-33); (b) the letter from Judge Lasker to Mr. Wohl dated July 31, 1974 (App. 34); (c) the transcript of a pretrial conference in this case held on August 14, 1974; and (d) an affidavit by Mr. Wohl, sworn to on February 24, 1975, and filed in support of the Government's motion for reargument of defendant's motion to dismiss the indictment in *United States* v. *Carome*, 70 Cr. 132 (S.D.N.Y.). Mr. Wohl's affidavit is reprinted in the Addendum, pages 12a-14a, *infra*. At the pretrial conference, Mr. Wohl stated that the telephone conversation with Judge Lasker's chambers occurred in late April or May of 1974. The letter to Judge Lasker dated July 25, 1974, and Mr. Wohl's affidavit both state that the telephone conversation occurred in May or early June.

The Roemer indictment was reassigned to Judge Wyatt. On August 14, 1974, he held a pretrial conference and scheduled the case for trial on October 29, 1974. On September 5, 1974, counsel for Roemer served papers in support of a motion to dismiss the indictment "pursuant to Rule 4 of the United States District Court Plan for Achieving Prompt Disposition of Criminal Cases, Rule 48(b) of the Federal Rules of Criminal Procedure, and the Speedy Trial provision of the Sixth Amendment of the United States Constitution" (App. 11). That motion was denied by Judge Wyatt on September 20, 1974.*

B. Rule 6 Does Not Apply.

Rule 6 of the Southern District Plan provides:

> "*Retrials.*
>
> Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause."

This Rule does not apply here because this Court in *Lasker* did not order a "trial or new trial". The opinion of this Court stated that "it is appropriate for this court to issue mandamus directing the district judge to reinstate the indictments that he dismissed in reliance on the Prompt Disposition Rules", 481 F.2d at 238, and the judgment of this Court stated that the petition for a writ of mandamus was granted "in accordance with the opinion of this court." This Court, therefore, ordered the District

---

* Judge Wyatt relied on this Court's earlier decision in *United States* v. *Lasker*, *supra*, and Judge Weinfeld's decision denying a similar motion in *United States* v. *Bisgyer*, 70 Cr. 129 (S.D.N.Y. Sept. 17, 1974). See page 2 of transcript of proceedings on September 20, 1974. The *Bisgyer* opinion is reprinted in the Addendum, pages 1a-4a, *infra*.

Judge to reinstate the indictment naming Roemer; it did not order a trial or new trial, and Rule 6 by its terms is not applicable.*

C. Roemer Waived Any Rights Conferred by Rule 6.

In the District Court, Roemer moved to dismiss the indictment pursuant to Rule 4 of the Southern District Plan and not Rule 6.** In this Court he has abandoned his

---

* Furthermore, there had never been a trial prior to this Court's decision in *Lasker*, and Rule 6 is captioned "Retrials". While the text of the Rule does refer to a "trial" as well as a "new trial", this Court in *United States* v. *Drummond*, Docket No. 74-2264 (2d Cir. Feb. 11 1975) indicated that the Rule should be limited to what the title specifies—retrials:

> "The Government will be ready without delay to retry most defendants who obtain reversals on appeal. By hypothesis, the Government usually has recently concluded trial of these cases. Thus, to emphasize the Government's need to be ready would generally be an empty formality." Slip opinion at 1786.

This rationale is totally inapplicable where, as here, there has been no prior trial. This interpretation of Rule 6 is consistent with the provisions of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 93d Cong., 2d Sess. (Jan. 3, 1975), 88 Stat. 2076, referred to by this Court in *Drummond*, slip opinion at 1786 n.8, and by Roemer at page 21, note 12, of his Brief. That Act would not apply to this case since the time limitation in Section 3161(e) applies only "[i]f the defendant is to be *tried again* following an appeal or a collateral attack" (emphasis added).

** Rule 4 of the Southern District Plan provides:

> "*All Cases: Trial Readiness and Effect of Non-Compliance.* In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of the complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment) whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost

[Footnote continued on following page]

claim below of a Rule 4 violation and instead relies on Rule 6.

Rule 7 of the Southern District Plan provides:

> "*Demand and Waiver Provisions.*
>
> A demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules. *However, failure of a defendant to move for discharge prior to plea of guilty or trial shall constitute waiver of such rights.*" (emphasis added).

Roemer never moved for discharge prior to trial on the basis of rights conferred by Rule 6. Under Rule 7, therefore, he waived any such rights, and his Rule 6 argument in this Court must be rejected.

D. Under Rule 6 There Was Good Cause for Extending the 90 day Period.

Rule 6 provides that the 90 day period may be extended for "good cause". In *United States* v. *Drummond,* Docket No. 74-2264 (2d Cir. Feb. 11, 1975), this Court stated with respect to the identical Rule 6 in the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases:

> "In view of the rigidity of the command of Rule 6, we believe that in this case the escape hatch of 'good cause' must be construed with an awareness of the practicalities." Slip opinon at 1786.

---

promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

This Court affirmed the judgment of conviction in *Drummond,* stressing the following four items, slip opinion at 1788, in determining that the 90 day period had been extended for "good cause":*

(1) "[T]he prosecution was ready to try Drummond again without undue delay and obviously misapprehended the change brought about by the Eastern District Plan adopted a few months before."

(2) "The new Rule was a departure from the former requirement of prosecutorial readiness only, which still permeated the rest of the Plan."

(3) "Rule 6 does not mention any sanction for failure to comply with it and was adopted without any published focus on the change for retrials." **

(4) "Also, while we would not ordinarily regard a defendant's inaction as significant in enforcing the speedy trial rules, in the context of this case and on these facts, we point out that Drummond was free on bail throughout the relevant period and made no

---

* Roemer at page 21 of his Brief notes that here "there was neither an order nor an application for an order to extend the ninety-day period." Neither was there in *Drummond.*

** There is no holding in *Drummond* that dismissal of the indictment is a proper sanction for failure to comply with Rule 6. The *Drummond* opinion refers to the retrial provision, Section 3161(e), of the Speedy Trial Act of 1974, Pub. L. No. 93-619, 93d Cong. 2d Sess. (Jan. 3 1975), 88 Stat. 2076. Slip opinion at 1786 n.8, 1789. Even if Section 3161(e) applied here, however, the act would provide no sanction for a violation. The sanctions specified in Section 3162 of the Act are limited to violations of Sections 3161(b) and 3161(c). Section 3162 of Senate Bill 754, 93d Congress, Second Session, as introduced in the Senate on February 5, 1973, provided for sanctions "[i]f a defendant is not brought to trial as required by section 3161". The Bill as reported by the Senate Committee on the Judiciary on July 18, 1974, however, limited the imposition of sanctions to situations where the requirements of Sections 3161(b) and 3161(c) were not met. The statute as enacted contained that same limitation.

> request that the judge reassign the retrial." (footnotes omitted)

Those same four factors are present here,*

While this Court in *Lasker* denied the motion of several defendants to stay issuance of the mandate, there certainly was good cause for Judge Lasker to delay any action until Supreme Court review was resolved. The writ from this Court directed him to reinstate the indictments. If the Supreme Court reversed this Court's decision, any trials in the interim would have been an unnecessary burden on the defendants and a waste of judicial resources. Indeed Roemer's Brief at pages 16-17 does not seem to argue otherwise.** Nor does Roemer question the period of delay between July 25, 1974, the date of Mr. Wohl's letter to Judge Lasker, and October 29, 1974, the date the trial began. Roemer's claim of a violation of Rule 6, therefore, is based on the 129 day period from March 18, 1974, the date the Supreme Court denied certiorari, to July 25, 1974.

That period of delay occurred because of several factors: the apparent failure by the attorneys who represented Judge

---

* Also in *Drummond* a portion of the delay was due to an unexplained delay in issuing the mandate.

** Roemer does claim at pages 14-16 of his Brief that appellate proceedings on his behalf ended in August 1973 because his counsel did not participate in the petition for certiorari in the Supreme Court. Rule 21 of the Supreme Court Rules, however, provides:

> "4. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this court, unless the petitioner shall notify the clerk of this court in writing of his belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served on all parties to the proceeding below and a party noted as no longer interested may remain a party here by notifying the clerk, with service on the other parties, that he has an interest in the petition."

There was no notice that Roemer did not have an interest in the outcome of the petition.

Lasker in the Supreme Court proceeding to inform him of the Supreme Court action, although they received immediate notification from the Supreme Court Clerk; the internal breakdown of the procedure for notification from the Solictor General's office to Mr. Wohl; the apparent failure of Judge Lasker's secretary to inform him about the telephone conversation with Mr. Wohl in May or early June; and the failure of Judge Lasker to receive a letter from Mr. Wohl shortly after the telephone conversation with his secretary.

Throughout this 129 day period, however, as well as the preceding months after this Court's mandate had issued, there was not a word from Roemer about a prompt trial. Under all of these circumstances, to dismiss this case for a violation of Rule 6 would elevate criminal defense gamesmanship to a new high and would be a rejection of this Court's pronouncement in *Drummond* that "the escape hatch of 'good cause' must be construed with an awareness of the practicalities."

E. Judge Tenney's Decision in *United States* v. *Carone*.

One of the defendants in one of the companion cases, *United States* v. *Carone*, did move to dismiss the indictment pursuant to Rule 6 of the Southern District Plan. Four days before this Court's decision in *Drummond*, Judge Tenney filed a Memorandum and Order granting the defendant's motion.* Following *Drummond*, the Government moved for reargument, and on March 4, 1975, Judge Tenney granted the Government's motion for reargument, vacated the Court's previous order and denied the defendant's

* Copies of Judge Tenney's Memorandum and Order dated February 6, 1975, were transmitted to the Clerk of this Court with a letter from Roemer's counsel dated February 18, 1975, requesting that they be distributed to the panel hearing this appeal.

motion to dismiss the indictment for failure to comply with Rule 6 of the Southern District Plan. Judge Tenney's Memorandum and Order dated March 4, 1975, is reprinted in the Addendum, pages 5a-11a, *infra*.

In his Memorandum granting the Government's motion, Judge Tenney found that there was "good cause" for excluding the period from March 18, 1974, until the case was reassigned to him in determining whether there had been a violation of Rule 6:

> "First, as was the case in *Drummond,* Carone was free on bail throughout the relevant period and, after certiorari was denied, made no request that the trial judge set an early trial date. Second, the Government was obviously unaware of the effect of the adoption of Rule 6 of the Southern District's Plan. Third, the failures in communication, which lead directly to the delay at issue, appear to have been unintentional." Addendum, pages 10a-11a, *infra*.

POINT II

Roemer's Constitutional Right To A Speedy Trial Has Not Been Denied.

In *Lasker,* 481 F.2d at 237-38, this Court also held that there had been no violation of Roemer's right to a speedy trial and that his Rule 48(b) motion would have had to be denied. Roemer now renews his Sixth Amendment constitutional argument, this time based on the 129 day period that is the basis for his Rule 6 argument. Roemer does not claim that he moved for a speedy trial during this period nor does he make any showing of prejudice from this period of delay.

In denying Roemer's motion, Judge Wyatt referred to Judge Weinfeld's decision in *United States* v. *Bisgyer,* 70

Cr. 129 (S.D.N.Y. Sept. 17, 1974), denying a similar motion by one of the defendants in one of the companion cases.* With regard to the portion of Bisgyer's motion based on the speedy trial provision of the Sixth Amendment, Judge Weinfeld stated:

> "Applying the criteria set forth in *Barker* v. *Wingo*, the delay in the instant case does not impinge upon the defendant's rights so as to foreclose the government from bringing him to trial. . . . The simple fact is that, had the defendant really wanted an earlier trial, there was no reason for him to passively await the outcome of either the motion for rehearing before the Court of Appeals or the petition for certiorari. He failed to make any motion that his trial proceed." Addendum, page 3a, *infra* (footnote omitted).

In *Drummond*, the defendant also combined a speedy trial argument with an argument under Rule 6. In affirming Drummond's conviction, this Court stated:

> "Citing *Strunk* v. *United States*, 412 U.S. 434 (1973), and *Barker* v. *Wingo*, 407 U.S. 514 (1972), appellant argues that his constitutional right to a speedy and fair trial, as well as his rights under the Plan, were violated. However, the one-year delay was not excessive. *United States* v. *Infanti*, 474 F.2d 522, 527-28 (2d Cir. 1973). Nor is there any indication that the delay was caused by a deliberate prosecutorial effort to postpone the trial. See *Barker* v. *Wingo, supra*, 407 U.S. at 531; *United States* v. *Infanti, supra*. Moreover, appellant never moved for a speedy trial, although he was represented by counsel at all times and was not incarcerated."

---

* The *Bisgyer* opinion is reprinted in the Addendum, pages 1a-4a, *infra*.

See *Barker* v. *Wingo, supra,* 407 U.S. at 528-29. Slip opinion at 1789-90. *See United States* v. *Saglimbene,* 471 F.2d 16 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973).

This Court should also conclude here that Roemer's constitutional right to a speedy trial has not been denied.

POINT III

The District Court's Evidentiary Rulings With Respect To Roemer's Job Performance Were Within The Scope of Its Discretion.

It is well settled that a public official cannot offer as a defense to bribery charges evidence that he was not in fact corrupted or influenced, or that he performed faithfully his official duties. *United States* v. *Jacobs,* 431 F.2d 754, 759-60 (2d Cir. 1970), *cert. denied,* 402 U.S. 950 (1971); *United States* v. *Manton,* 107 F.2d 834, 846 (2d Cir. 1939), *cert. denied,* 309 U.S. 664 (1940). *See United States* v. *Irwin,* 354 F.2d 192, 196 (2d Cir. 1965), *cert. denied,* 383 U.S. 967 (1966). Roemer concedes as much at pages 33 and 39-40 of his Brief, yet he asserts that the Government somehow "opened the door" to such "irrelevant evidence" by introducing Government Exhibits 1 and 2.*

According to Roemer's Brief at page 40, those Exhibits "raised the question of Roemer's performance *as a general proposition.*" (Emphasis in original). To the contrary, the Exhibits, each denominated a "Certificate of Understanding" between Roemer and AAFES, set forth rules aimed at the avoidance of conflicts of interest, acceptance of gratuities, and other improper behavior. Each was signed by Roemer,

---

* Roemer now claims that admission of these Exhibits was improper, but he did not object at trial (Tr. 51). He therefore failed to preserve the issue for review. *United States* v. *Indiviglio,* 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied,* 383 U.S. 907 (1966).

and each clearly was admissible as evidence of Roemer's guilty knowledge and intent. Indeed, Roemer's trial counsel expressly recognized that these exhibits were property admitted to prove "that he knew he was supposed to be a conscientious public servant" (Tr. 70).

Roemer's claim that these Exhibits raised other, irrelevant, issues has no merit. The District Court properly charged the jury on the elements of the crime, and Roemer does not object here to the charge. Under such circumstances, there is no reason whatever to credit Roemer's assertion that these Exhibits presented to the jury the issues of the quality of Roemer's performance in general, and whether or not he violated his oath of office.

Moreover, the District Court permitted Roemer to prove that "he never purchased merchandise from [the companies which provided him with kickbacks] or he purchased it in normal quantities, whatever it is you want to show about it." (Tr. 74). Thus, Roemer was allowed to show, although in a more limited fashion than he desired, that he was not in fact corrupted or influenced in his official duties. Accordingly, if any error were committed at all, it was in Roemer's favor, for even this limited proof of the faithful performance of his duties was irrelevant. *United States* v. *Manton, supra.*

In any event, the scope of cross-examination and whether or not a party has "opened the door" to examination on a particular subject is a matter within the discretion of the trial judge. *United States* v. *Evanchik,* 413 F.2d 950, 953 (2d Cir. 1969); *United States* v. *Dardi,* 330 F.2d 316, 333 (2d Cir.), *cert. denied,* 379 U.S. 845 (1964). No abuse of discretion is alleged here, nor could any be shown. This Court has, on occasion, found an abuse of discretion where highly prejudicial and inflammatory evidence was admitted *against* an accused. *United States* v. *Beno,* 324 F.2d 582 (2d Cir. 1963), *cert. denied,* 379 U.S. 880 (1963); *United*

States v. *Provoo*, 215 F.2d 531 (2d Cir. 1954). There can be little merit to such a claim, however, where as here the trial judge exercised his discretion in favor of excluding wholly irrelevant evidence. The trial judge merely cut off inquiry into collateral matters which would have served to confuse the jury.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

V. THOMAS FRYMAN, JR.,
DAVID A. CUTNER,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

ADDENDUM

Opinion (Weinfeld *D.J.*)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

#41176 70 Cr. 129

UNITED STATES OF AMERICA,

—against—

MELVILLE BISGYER,

Defendant.

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York
Attorney for United States of America

FRANK H. WOHL, ESQ.
Assistant United States Attorney
Of Counsel

PHILIP VITELLO, ESQ.
Attorney for Defendant

By: HENRY J. BOITEL, ESQ.
233 Broadway
New York, New York

Opinion (Weinfeld, D.J.)

EDWARD WEINFELD, *D.J.*

The history of this prosecution to the date of the dismissal of the indictment by Judge Lasker is set forth in the opinion of the Court of Appeals, which on June 11, 1973 isued a mandamus directing the reinstatement of the indictment herein, as well as six other related indictments naming other defendants.[1] Thereafter, several of those defendants applied to the Court of Appeals for a rehearing, which was denied, and later petitioned the Supreme Court for a writ of certiorari, which was denied on March 18, 1974. This defendant, who did not join in those applications, made no move to bring his case to trial, although the government's readiness to proceed forthwith was stated on March 23, 1972.

Following the denial of the petition for certiorari, Judge Lasker referred this case to the Assignment Committee of the Court and it was assigned to this court on August 1, 1974. On August 9 the prosecution served a "notice of readiness for trial," and on August 16, 1974, this court set the case for trial on September 30, 1974. Then, on August 23, after the case had been set for trial, the defendant made the present motion to dismiss the indictment pursuant to (1) Rule 4 of the Local "Prompt Disposition Rules for Criminal Cases," (2) Rule 48(b) of the Federal Rules of Criminal Procedure, and (3) the speedy trial provision of the Sixth Amendment of the Constitution.

None of the asserted grounds requires dismissal of the indictment. The government gave notice of its readiness to proceed to trial forthwith in March 1972, as the Court of

(1) 481 F.2d 229 (2d Cir. 1973), *cert. denied*, — U.S. — (March 18, 1974).

Appeals found.[2] That notice was in effect throughout the various appellate proceedings. There is no requirement that a new notice be served.[3] Here the government, apparently out of an abundance of caution, served a second notice of readiness on August 9, following which, as already noted, the case was promptly set for trial.

As to the second branch of defendant's motion, the Court of Appeals expressly considered and ruled that defendant was not entitled to relief under Rule 48(b). Since that determination, nothing has been presented to warrant relief under either that Rule or the third branch of defendant's motion, the speedy trial provision of the Sixth Amendment. Applying the criteria set forth in *Barker* v. *Wingo*,[4] the delay in the instant case does not impinge upon the defendant's rights so as to foreclose the government from bringing him to trial. The delay consequent to the appellate process pursued by other defendants was justified. It is clear that defendant, while not a movant for rehearing before the Court of Appeals or a petitioner for certiorari, was hopeful that the order reinstating the indictments would be reversed in the proceedings carried on by the other defendants. Had success crowned their efforts, he would have been a beneficiary.[5] Moreover, had certiorari been granted and the indictments dismissed, there is little doubt that, since the cases of all defendants in the separate indictments were closely related, the government perforce would have filed a nolle prosequi as to this defendant. The simple fact is that, had the defendant really wanted an earlier

---

(2) 481 F.2d at 232.

(3) *Cf.* United States v. Masullo, 489 F.2d 217, 224 (2d Cir. 1973).

(4) 407 U.S. 517, 530-33 (1972).

(5) *Cf.* Provident Tradesmen's Bank & Trust Co. v. Lumbermen's Mut. Cas. Co., 411 F.2d 88, 97-98 (3d Cir. 1969); *see also* Rule 21(4), Supreme Court Rules.

trial, there was no reason for him passively to await the outcome of either the rehearing before the Court of Appeals or the petition for certiorari. He failed to make any motion that his trial proceed.

The attorney for the defendant (not the defendant himself) avers that the defendant has been prejudiced by the death of two unnamed witnesses in July of 1970 and January of 1971. These witnesses allegedly would have testified to defendant's reputation in the business community, the setting from which the charges in the indictment arose. The deaths occurred prior to June 1973, when the Court of Appeals reinstated the indictment. But apart from that, defendant makes no claim that there are no other witnesses among his friends, associates or business acquaintances who could give the same testimony that might have been provided by the deceased business acquaintances.[6] Thus, there is no showing that the defense has been impaired or prejudiced by the loss of specific evidence or the testimony of material witnesses.[7]

The motion is denied in all respects, and both prosecution and defense are directed to be ready to proceed to trial on September 30, 1974, as presently scheduled.

Dated: New York, N. Y.
September 16, 1974

EDWARD WEINFELD
United States District Judge

---

(6) *See* Michelson v. United States, 335 U.S. 469 (1948).

(7) United States v. Ewell, 383 U.S. 116, 122-23 (1966); United States v. Parrott, 315 F. Supp. 1012, 1014-15 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 972 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970).

Memorandum (Tenney, D.J.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Cr. 132 (CHT)

UNITED STATES OF AMERICA

—against—

DONALD F. CARONE and FRITZ CLAUDIUS MINTZ,
Defendants.

TENNEY, *J.*

On February 7, 1975, this Court filed a Memorandum and Order dismissing the instant indictment as to defendant Carone for failure to comply with Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases ("the Southern District's Plan").[1] Four days later, the Court of Appeals for the Second Circuit issued a decision in the case of *United States* v. *Drummond*, No. 74-2264 (2d Cir., Feb. 11, 1975), which dealt, in part, with an identically worded Rule appearing in the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases ("the Eastern District's Plan"). The Government has now moved to reargue the issue previously

[1] Rule 6 reads as follows:

"6. *Retrials.*
Where a new trial has been ordered by the district court or *a trial* or new trial *has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order unless extended for good cause.*" (Emphasis supplied)

raised by defendant as to whether Rule 6 of the Southern District's Plan was violated. It claims that the Court's Order of February 7, 1975 is inconsistent with the *Drummond* decision. For the reasons stated *infra*, the Government's motions for reargument and for denial of defendant's Rule 6 motion are granted.

Before discussing the points raised by the Government on the motion for reargument, it is necessary to summarize the *Drummond* decision. Among the issues considered by the Court of Appeals in that case was whether the failure to retry Drummond (whose previous conviction had been reversed by that court on July 5, 1973, *United States* v. *Drummond*, 481 F.2d 62 (2d Cir.)) until nearly ten months after the Court of Appeals' mandate had issued constituted a violation of Rule 6 of the Eastern District's Plan.

The delay in Drummond's retrial was occasioned in large part by the fact that the trial judge, to whom the case had been assigned for purposes of retrial, was about to commence another rather lengthy and complex criminal case. Some seven months after the case had been assigned, Drummond moved to dismiss the indictment for failure to commence his retrial within the time required by the Eastern District's Plan. That motion was denied but shortly thereafter, the trial judge reassigned the case to another judge, who retried the case within a relatively short time.

After noting that "the escape hatch of 'good cause' [in Rule 6] must be construed with an awareness of the practicalities," *United States* v. *Drummond*, *supra*, at 1786 (slipsheet), the Court of Appeals held that "[u]nder all the circumstances", the delay in retrying Drummond was for "good cause". *Id.* at 1788.

Memorandum (Tenney, D.J.)

The "practicalities" which persuaded the Court of Appeals that the command of Rule 6 had not been violated in that case were: (1) the fact that the Government had "obviously misapprehended the change brought about by the Eastern District's Plan adopted a few months before", *id.* at 1788; (2) the fact that "Drummond was free on bail throughout the relevant period and made no request that the judge reassign the retrial," *id.;* and (3) the fact that a "significant portion of the delay" was not due to any failure of the district court but to the Court of Appeals' delay in issuing its mandate, *id.* The Court of Appeals clearly regarded its holdings as limited to the facts and circumstances presented, and emphasized that it would "not tolerate a delay of this sort in the *future.*" *Id.* at 1789 (emphasis supplied).

The Court will not review the facts recited in its previous Memorandum and Order.[2] Additional facts have been offered on the motion for reargument and the Court shall make reference to them where appropriate.

The Government argues that, in view of the Court of Appeals' approach in the *Drummond* case, this Court should find that the failure to try Carone within ninety days after the Supreme Court had denied certiorari (March 18, 1974)[3]

---

[2] *United States* v. *Donald F. Carone and Fritz Claudius Mintz,* 70 Cr. 132 (S.D.N.Y., Feb. 7, 1975).

[3] Although defendant now suggests that the 90 day period commenced running on June 11, 1973, when the Court of Appeals issued its decision reinstating the instant indictment, or on September 6, 1973, when the Court of Appeals' mandate was issued, it should be noted that, when he originally moved for dismissal under Rule 6 of the Southern District Plan, he merely argued that the period commenced on the date on which certiorari was denied, *i.e.,* March 18, 1974. Moreover, it cannot be seriously contended that the failure to commence trial during the period from June 11, 1973 until March 18, 1974 is chargeable to the trial judge or the government.

was for "good cause". The Government's arguments shall be discussed *seriatim.*

First, the Government argues that Rule 6 of the Southern District's Plan is limited to *retrials.* The Government bases this contention upon the fact that Rule 6 is entitled "Retrials" and upon the fact that the *Drummond* decision addressed itself solely to the issue of the Rule's applicability to retrials.

These arguments are wholly unpersuasive. Although Rule 6 is entitled "Retrials", the wording of the Rule, see n.1 *supra,* supports defendant's position that Rule 6 was also intended to apply to situations such as the instant one, where appellate review precedes trial. Certainly, the language of the Rule takes precedence over the title attached to it. Additionally, the *Drummond* decision cannot be read as restricting Rule 6 to retrials since the issue here—the applicability of that Rule to cases in which no trial has been held—was not raised.

The Government further contends that, even assuming *arguendo* that Rule 6 applies, defense counsel's failure to apprise the trial judge that the Supreme Court had denied certiorari as soon as trial counsel learned of this fact on March 18 or 19, 1974,[4] and his failure thereafter to ask for an early trial date for his client, make this case analogous to *Drummond.*[5]

---

[4] Affidavit of V. Thomas Fryman, Jr., dated Feb. 25, 1974, Exh. 1B.

[5] Defendant now contends that, as early as June 12, 1974, the Assistant United States Attorney who was in charge of the instant matter, Mr. Frank W. Wohl, was requested to try the criminal case as soon as possible. (Affidavit of Gregory J. Perrin, dated June 14 1974, ¶ 30, filed in *United States* v.

[Footnote continued on following page]

Memorandum (Tenney, D.J.)

In *Drummond,* the Court of Appeals noted that,

> "while we would not ordinarily regard a defendant's inaction as significant in enforcing the speedy trial rules, *in the context of this case and on these facts, we point out that Drummond was free on bail throughout the relevant period and made no request that the judge reassign the retrial.*" *United States* v. *Drummond, supra,* at 1788 (footnotes omitted and emphasis supplied).

It is difficult to believe that the Court of Appeals intended that its decision be interpreted as repealing Rule 7 of the Southern District's Plan, which provides in pertinent part that "[a] demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules." In view of the decision in *Drummond,* however, the Court is of the opinion that defendant's inaction, coupled with the fact that he was free on bail throughout the relevant period, are factors which must be considered in determining whether dismissal of an indictment is warranted under Rule 6 of the Southern District's Plan.

The third argument raised on this motion for reargument is that, taking all of the "practicalities" of the case into account, "good cause" for failing to try Carone by June 18, 1974 has been established. In this regard, the Court notes that both the trial judge and the Government made several good faith attempts at reasonable intervals to monitor the progress of Carone's case on appeal.[6] It would

---

Carone, et al., Civ. No. 1204-71 (D.N.J., filed Aug. 26, 1971)). This Court does not believe that the request—which was not addressed to the trial court to which the instant case was assigned but rather to Mr. Wohl in the course of a separate civil proceeding—constituted a "demand" for a speedy trial within the meaning of the Southern District's Plan.

[6] Affidavit of Frank W. Wohl, filed Feb. 25, 1975, ¶¶ 3-6.

now appear that the failure to schedule trial in the case by June 18, 1974 was owing to a failure of communication between the Solicitor General's Office and the Attorney General's Office in New York [7] and, subsequently, another failure of communication between the Assistant United States Attorney in charge of the case and the trial judge.[8] Additionally, the Court is obligated under *Drummond* to take note of the fact that the change in the language of Rule 6, brought about by the adoption of the Southern District's Plan in place of the Second Circuit's Rule Regarding the Prompt Disposition of Criminal Cases, may understandably have gone unnoticed. *United States* v. *Drummond, supra,* at 1788. Similarly, the Rule's application to cases which proceed through appellate review prior to trial could also have gone unnoticed. The Government's initial position, when the Rule 6 issue was first raised in this case, supports this conclusion.

The responsibility for monitoring the progress of a case is that of both the Government and the trial judge. *Id.* at 1789. Had these events occurred *after* the *Drummond* decison had been issued, the Court would have had no hesitation in holding that the failure to try Carone by June 18, 1974 was a violation of Rule 6. However, in light of the Court of Appeals' direction that "the escape hatch of 'good cause'" be construed with "an awareness of the practicalities," the Court is compelled to hold that the period between March 18, 1974 and August 1, 1974 (when the case was reassigned to this Court) should have been excluded in determining whether there had been a violation of Rule 6. First, as was the case in *Drummond,* Carone was free on bail throughout the relevant period and, after certiorari was denied, made no request that the trial judge set an

---

[7] *Id.* at ¶¶ 4, 6.

[8] *Id.* at ¶ 5.

early trial date. Second, the Government was obviously unaware of the effect of the adoption of Rule 6 of the Southern District's Plan. Third, the failures in communication, which lead directly to the delay at issue, appear to have been unintentional.

Accordingly, the Government's motion for reargument having been granted, its motion to vacate the Court's previous order and to deny defendant's motion to dismiss the indictment for failure to comply with Rule 6 of the Southern District's Plan is hereby granted. Trial shall commence on April 7, 1975.[9]

So ordered.

Dated: New York, New York
March 4, 1975

CHARLES H. TENNEY
U.S.D.J.

---

[9] When the instant motion was originally filed, both sides were advised that, should the Government's motion for reargument be granted and the Court's previous order be vacated, trial would commence on Monday, March 10, 1975. On February 24, 1975, the Court was advised that, in view of the previous dismissal of the indictment as against Carone, the Government could not arrange in the interim for the service of certain trial subpoenas. It has therefore asked for an adjournment of at least twenty days in order to arrange for the service of these subpoenas. The defendant opposes any further extension. Although the Court appreciates defendant's position, the recent history of this case is such as to justify a short adjournment for purposes of trial preparation. Therefore, the trial date is adjourned from March 10, 1975 to April 7, 1975.

Affidavit of Frank H. Wohl

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Cr. 132 (CHT)

UNITED STATES OF AMERICA

—v—

DONALD F. CARONE and FRITZ CLAUDIUS MINTZ,
Defendants.

State of New York
County of New York
Southern District of New York ss.:

FRANK H. WOHL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the Office of **Paul J. Curran,** United States Attorney for the Southern District of New York. From approximately August 1, 1973 until approximately January 15, 1975 I was in charge of this case, and I am familiar with its facts.

2. I make this affidavit in support of the government's motion for reargument on defendant Carone's motion to dismiss the indictment for failure to comply with the District Court Plan for Achieving Prompt Disposition of Criminal Cases.

3. During the fall of 1973 I had a telephone conversation with Judge Morris E. Lasker as a result of which I understood that he intended to hold in abeyance all seven of the companion cases which included this indictment

pending the decision by the Supreme Court on the petition for certiorari filed on his behalf by several defendants including defendant Carone. Judge Lasker asked me to keep him informed of developments in these cases.

4. Between then and January 1974 I received three or four calls from Judge Lasker's chambers inquiring as to whether I had heard anything about the progress of the case in the Supreme Court. On each of those occasions and several other occasions, I called the Solicitor General's office and was told the status of the case, in which the Solicitor General's response had not been filed. I also explained to the representative of the Solicitor General's office that, in light of the history of these cases, our office needed immediate information of the Supreme Court's action. I was told that there was a routine procedure by which I would be informed of the Court's decision quickly after it was handed down. In each of those occasions I relayed this information to Judge Lasker's chambers.

5. In May or early June 1974 I received another telephone inquiry from Judge Lasker's secretary. I again called Washington, this time to find that the Court had denied certiorari in March. I immediately relayed this information to Judge Lasker's secretary who asked me to write the Judge a letter informing him of the Court's action. I agreed to do so. That telephone conversation with Judge Lasker's secretary and the absence of any file copies in our office of a letter from me to Judge Lasker are discussed in my letter dated July 25, 1974, quoted in this Court's Memorandum and Order granting defendant Carone's motion.

6. Shortly after speaking to Judge Lasker's secretary, I called the Department of Justice in Washington to find out why our office had not been notified of the Court's

action. I was told that this office had been notified by a letter in April 1974. I had not received that letter.

7. To my knowledge at no time during this period did counsel for defendant Carone or for any of the companion defendants notify the Court or this office that the Supreme Court had disposed of the certiorari petition or that they were ready to proceed to trial.

s/ FRANK H. WOHL

FRANK H. WOHL
Assistant United States Attorney

Sworn to before me this
24th day of February 1975

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

Affidavit of V. Thomas Fryman, Jr.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Cr. 132 (CHT)

UNITED STATES OF AMERICA

—v—

DONALD F. CARONE and FRITZ CLAUDIUS MINTZ,
Defendants.

State of New York
County of New York
Southern District of New York ss.:

V. THOMAS FRYMAN, JR., being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York. I make this affidavit in support of the Government's motion for reargument of defendant Carone's motion to dismiss the indictment.

2. Attached hereto as Exhibit 1 is a copy of a letter to me dated February 21, 1975 from Francis J. Lorson, Deputy Clerk of the Supreme Court of the United States, which I received today. Copies of the enclosures to that letter are attached hereto as the following exhibits:

Exhibit No.

1A Appearance in the Supreme Court of the United States of Max Wild in *Lasker* v. *United States.*

1B Telegram dated March 18, 1974 from the Clerk of the Supreme Court of the United States to Max Wild.

1C Letter dated March 18, 1974 from the Clerk of the Supreme Court of the United States to Max Wild.

1D Appearance in the Supreme Court of the United States of Gregory J. Perrin in *Lasker* v. *United States.*

3. As shown by Exhibit 1A, defendant Carone's former counsel, Max Wild, entered an appearance in the Supreme Court of the United States for the petitioner, Honorable Morris E. Lasker, in *Lasker* v. *United States,* Docket No. 73-746. As shown by Exhibit 1B, the Clerk of the Supreme Court of the United States sent a telegram to Mr. Wild on March 18, 1974 informing him that the Supreme Court on that date had denied the petition for certiorari in *Lasker* v. *United States.* That telegram was confirmed by the letter to Mr. Wild from the Clerk of the Supreme Court dated March 18, 1974, a copy of which is attached hereto as Exhibit 1C.

4. On December 10, 1974 the substitution of Gregory J. Perrin for Max Wild as counsel for defendant Carone in this case was completed.

5. As shown by Exhibit 1D, Mr. Perrin also entered an appearance in the Supreme Court of the United States for the petitioner, Honorable Morris E. Lasker, in *Lasker* v. *United States,* Docket No. 73-746. Mr. Perrin indicated in

his Appearance Form that notification of the Supreme Court action should be sent by collect telegram to Max Wild.

6. This Court in its Memorandum and Order filed February 7, 1975, referred to the letter from Judge Lasker dated July 31, 1974 to Assistant United States Attorney Frank H. Wohl. That letter indicates that neither Mr. Wild nor Mr. Perrin ever informed Judge Lasker, the petitioner for whom they appeared in the Supreme Court of the United States, of the denial of certiorari on March 18, 1974.

s/ V. THOMAS FRYMAN, JR.

V. THOMAS FRYMAN, JR.
Assistant United States Attorney

Sworn to before me this
25th day of February, 1975

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1975

Exhibit 1, Annexed to Foregoing Affidavit

Supreme Court of the United States
Office of the Clerk
Washington, D. C. 20543

February 21, 1975

V. Thomas Fryman, Jr., Esq.
Asst. U.S. Atty. for SDNY
U. S. Attorney's Office
U. S. Courthouse
Foley Square
New York, New York 10007

Re: *Lasker* v. *United States,* No. 73-746

Dear Mr. Fryman:

Pursuant to our telephone conversation of February 20, 1975, enclosed please find copies of our notification of the denial of the petition for a writ of certiorari sent to Mr. Wild as well as copies of the appearance forms submitted by Mr. Wild and Mr. Perrin. The original of these documents is contained in the above-entitled case correspondence file located in this office.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By FRANCIS J. LORSON
FRANCIS J. LORSON
Deputy Clerk

dm
Enclosure

Exhibit 1A, Annexed to Foregoing Affidavit

Appearance Form

SUPREME COURT OF THE UNITED STATES

No. 73-746, OCTOBER TERM, 1973

HONORABLE MORRIS E. LASKER

(Petitioner or Appellant)

vs

UNITED STATES OF AMERICA

(Respondent or Appellee)

The Clerk will enter my appearance as Counsel for the Petitioner

Signature MAX WILD
Type or Print Name Max Wild

Address 598 Madison Avenue
City and State New York, New York 10022

NOTE: This appearance must be signed by an individual *Member of the Bar of the Supreme Court of the United States.*

The Clerk will enter my appearance as Counsel for the Court by means of:

[X] Collect Telegram

[ ] Airmail Letter

[ ] Regular Mail

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed *he will perform that function.*

Exhibit 1A, Annexed to Foregoing Affidavit

In this case the person to be notified for

[X] Petitioner(s)

[ ] Respondent(s)

[ ] Appellant(s)

[ ] Appellee(s)

[ ] Amicus

is:

Max Wild

(Name—Type or Print)

Rubin, Wachtel, Baum & Levin

598 Madison Avenue
(Street Address)

New York, New York 10023
(City, State and Zip Code)

Exhibit 1B, Annexed to Foregoing Affidavit

TELEGRAM

COLLECT

MAR 18 1974

To Max Wild
Rubin Wachtel Baum and Levin

Street & No. 598 Madison Avenue
City & State New York, New York 10023

Petition for certiorari LASKER against UNITED STATES DENIED today

Sender's Tel. No. 73-746 P

ht

Name & Address Michael Rodak, Jr., Clerk
Supreme Court of the United States

Exhibit 1C, Annexed to Foregoing Affidavit

MAR 18 1974

Max Wild, Esq.
Rubin, Wachtel, Baum and Levin
598 Madison Avenue
New York, New York 10023

RE: LASKER, U.S. Dist. JUDGE for SDNY v.
UNITED STATES, 73-746

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

MICHAEL RODAK, JR., CLERK

Very truly yours,

By

s/ HELEN TAYLOR
Helen Taylor, (Mrs.)
Assistant Clerk

Exhibit 1D, Annexed to Foregoing Affidavit

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. 73-746, OCTOBER TERM, 1973

Honorable Morris E. Lasker

United States of America

(Petitioner or Appellant)

vs.

United States of America

Raymond F. Carr and Albert Ferguson

(Respondent or Appellee)

The Clerk will enter my appearance as Counsel for the Petitioner and Carr & Ferguson

Signature Gregory J. Perrin
Type or Print Name Gregory J. Perrin, Esq.

Address 30 Vesey Street
City and State New York, N. Y. 10007

NOTE: This appearance must be signed by an individual *Member of the Bar of the Supreme Court of the United States.*

The Clerk is requested to notify counsel of action of the Court by means of:

[X] Collect Telegram

[ ] Airmail Letter

[ ] Regular Mail

Exhibit 1D, Annexed to Foregoing Affidavit

NOTE: When more than one attorney represents a single party or group of parties, counsel should designate a particular individual to whom notification is to be sent, with the understanding that if other counsel should be informed *he will perform that function.*

In this case the person to be notified for

[√] Petitioners

[ ] Respondent(s)

[ ] Appellant(s)

[√] Appellees

[ ] Amicus

is:

Max Wild, Esq.
(Name—Type or Print)

598 Madison Avenue
(Street Address)

New York, N. Y. 10022
(City, State and Zip Code)

★ U. S. Government Printing Office 1975— 614—212—479

Form 280 A - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

V. Thomas Fryman, Jr. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 10th day of March 1975 he served ~~a copy~~ 2 copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

La Rossa, Shargel & Fischetti
522 Fifth Avenue
New York, New York 10036

And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop~~ for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

V. Thomas Fryman, Jr.

V. Thomas Fryman, Jr.

Sworn to before me this

10th day of March, 1975

Lawrence S. Felsh

Notary Public, State of New York
No. 03-[illegible]
Qualified in New York County
Commission Expires March 30, 1976